No. ~~888~~ 70-31

In the Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
HOWARD E. SHAPIRO,
STEPHEN RUBIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

410-631—70——1

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No. 903

PORT OF PORTLAND, ET AL., APPELLANTS

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MEMORANDUM FOR THE UNITED STATES

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A), affirming without opinion the report and orders of the Interstate Commerce Commission (J.S. App. B, C, and D) granting the application of the appellee railroads. Although statutory defendant below,[1] the United States agreed with the plaintiffs (appellants here) that the Commission erred in its challenged decision. For reasons hereinafter detailed, the United States agrees with the appellants that substantial questions affecting the continued viability of rail competition in the Pacific Northwest and the proper administration of the Interstate Commerce Act warrant this Court's plenary review of this case.

[1] 28 U.S.C. 2322.

STATEMENT

At issue in this proceeding is the joint acquisition and control of Peninsula Terminal Company, an independent switching railroad, by two of the four line-haul railroads now authorized to serve Portland, Oregon, directly. Current interest in Peninsula stems from its proximity to the eastern border of the Rivergate Industrial District, a 2,942 acre port and industrial complex owned and under development by the Port of Portland. The Rivergate complex is strategically situated at the confluence of the Columbia and Willamette Rivers (J.S. App. B–4, B–5), and it is estimated without challenge that the ultimate public and private investment there will exceed 500 million dollars. Rail traffic generated by Rivergate industries is expected to reach, at full development, between 500 and 600 cars per day, with an annual volume of five million tons of freight (J.S. App. B–47).

Peninsula's tracks provide one of two rail access routes to Rivergate. Barnes Yard, the other point of access, is owned by the Union Pacific Railway Company. These two access terminals are connected by tracks owned jointly by the Union Pacific and the Spokane, Portland & Seattle Railway Company ("SP&S") (J.S. App., B–38), which are also the only rail carriers whose tracks now connect with those of Peninsula.[2] The present litigation arises out of

[2] A map is set forth following J.S. App. E–65. The SP&S is now a subsidiary of Great Northern Pacific & Burlington Lines, Inc. ("Burlington Northern"), the new company formed by the merger of the Great Northern Railway Company and the Northern Pacific Railway Company, approved by this Court

the joint application of the SP&S and Union Pacific, filed on July 25, 1967, seeking Commission approval under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), of a joint acquisition of control of Peninsula.

In response to the application, the two other trunk-line railroads serving Portland, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") and the Southern Pacific Transportation Company—filed petitions seeking inclusion as joint and equal owners of Peninsula (under Section 5(2)(b), (c) and (d), 49 U.S.C. 5(2)(b), (c) and (d)) and the right to use tracks necessary to connect their own lines with Peninsula's tracks (under Section 3(5), 49 U.S.C. 3(5)). After a full administrative hearing, the Commission's hearing examiner approved the proposed acquisition, conditioned upon the inclusion of the Milwaukee and Southern Pacific as equal owners, and granted the related trackage rights sought by those carriers (J.S. App. E). However, upon exceptions by the SP&S and Union Pacific, the Commission (Division 3) authorized the acquisition without these conditions, thus giving SP&S and Union Pacific the sole right to use the Peninsula access to Rivergate (J.S. App. B).

The decision was challenged in the court below by the Port of Portland and the Public Utility Commis-

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last Term in the *Northern Lines Merger Cases*, 396 U.S. 491. As an aspect of that merger, the SP&S was permitted to lease its properties to Burlington Northern, so that it operates as an integral part of Burlington Northern. Prior to the merger, the SP&S was jointly owned by the Northern Lines.

sioner of Oregon,[3] later joined by appellants the Milwaukee and Southern Pacific. The United States filed an answer supporting the plaintiffs. The district court dismissed the complaints, without opinion, in an Order and Judgment dated July 9, 1970 (J.S. App. A). This appeal followed.[4]

DISCUSSION

1. As we have pointed out, the SP&S is an integral part of the rail system of the powerful Northern Lines, now merged to constitute the Burlington Northern by reason of this Court's decision a year ago in the *Northern Lines Merger Cases* (see *supra*, p. 2, n. 2). The competitive position of the Milwaukee (one of the petitioners here for rights in the Peninsula trackage) was—as the Court's opinion in *Northern Lines* reflects, 396 U.S. at 496–497, 500, 514–516—a central element in the administrative and judicial proceedings which ultimately resulted in that merger. Initially, the Commission disapproved the merger, in substantial measure because of the adverse impact it would have upon the relatively weak Milwaukee, the only source of competition for the dominant Northern Lines across the Northern tier of states. *Great Northern Pacific & Burlington Lines,*

[3] The Port of Portland and the Public Utility Commissioner of Oregon, among others, had intervened in the Commission proceedings in support of the joint ownership of Peninsula by the four involved railroads.

[4] Following commencement of the district court proceedings, the Commission entered an order on December 8, 1969, postponing the effective date of its earlier order until further order of the Commission.

Inc., Merger—Great Northern, 328 I.C.C. 460 (1966). When the Commission subsequently decided to approve the creation of Burlington Northern on reconsideration, a fundamental justification for its change of position was the merger parties' agreement to protective conditions, by which the Commission found that the Milwaukee "will be substantially strengthened as a meaningful transcontinental competitor" of the merged Great Northern and Northern Pacific. 331 I.C.C. 228, 271–273 (1967); see 396 U.S. at 516.

The principal condition to the Northern Lines merger intended to strengthen the Milwaukee is Condition 24(a), which for the first time granted the Milwaukee direct access into the Portland area. This Condition, whose adoption was anticipated in the Milwaukee's petition for inclusion in the Peninsula acquisition provides in part:

> Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of [Burlington Northern] between Longview Junction, Wash., and Portland, Oreg., [Burlington Northern] shall grant to the Milwaukee * * * trackage rights to operate freight trains over [Burlington Northern] lines between Longview Junction and Portland, *including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of [Burlington Northern] facilities at Portland necessary for the switching of traffic to other railroads and industries.* [331 I.C.C. 228, 357, Appendix L; emphasis added].[5]

[5] The condition is set forth in full at J.S. App. B–13, n. 5.

This condition was of major importance because, as this Court noted, the Milwaukee's "past failure to become a meaningful competitor came in large part because its lines did not reach into Portland, Oregon * * *." 396 U.S. at 515. The Commission emphasized that this condition would permit the Milwaukee "to solicit additional traffic, and to enter into heretofore inaccessible markets" in Portland. 331 I.C.C. at 276.

It is axiomatic that the promise of the Northern Lines merger to make the Milwaukee a "meaningful competitor" for the vital long-haul traffic between Portland and the Northern tier cannot be fulfilled unless the Milwaukee is given direct and unconditional access to terminal facilities at Portland; a terminal carrier has long been recognized as possessing an inherent advantage in obtaining the line-haul traffic of area industries. *St. Louis Southwestern Railway Co., et al.—Purchase—Alton & Southern Railroad*, 331 I.C.C. 515, 534; *Norfolk and Western Railway Company—Control—FP&E Company—Purchase—Fairport, Painesville and Eastern Railroad Company*, 330 I.C.C. 672, 680; *Control of Central California Traction Company*, 131 I.C.C. 125, 135–136.[6] Nonetheless, the Commission has here effectively denied the Milwaukee equal access to the one neutral terminal facil-

[6] Indeed, in the instant case, the Commission examiner found that "* * * a representative of SP&S doubts that carriers with no direct Rivergate access rights would have as much incentive to do business there as a direct access carrier. Normally the switching carrier has the solicitation advantage." J.S. App., E–16—E–17.

ity remaining in Portland and, what is of greater long run significance, the opportunity to meaningfully compete for the substantial line-haul rail traffic which is projected to develop in the strategic Rivergate district.

The Commission's refusal to give effect to the Portland condition in Milwaukee's favor in the present case was explained as follows:

> Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to Northern Lines trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by the Commission. [J.S. App., B–19.]

Presumably, then, the Commission would have effectuated the Condition here but for the fact that Burlington Northern joined Union Pacific with it in its takeover of Peninsula. Allowing the Burlington Northern thus to evade this obligation is, we submit, arbitrarily to abrogate a fundamental element of the Commission's order approving that merger. We fail to understand why Burlington Northern must be allowed to do jointly what it could not do alone.

The Commission was in any event incorrect in suggesting that Union Pacific's interests could not appropriately be affected by a condition imposed in the

Northern Lines merger proceedings.[7] In fact, although not a party there, the Union Pacific presented in great detail its position regarding the entry of the Milwaukee into Portland. 331 I.C.C. 282–283. Having considered the Union Pacific's contentions, the Commission concluded that the public interest in having the Milwaukee enter all Northern Lines markets on an equal competitive basis outweighed the Union Pacific's asserted injury, particularly since "the addition of the Milwaukee as a competitor at Portland would be somewhat offset by the elimination of Northern Pacific and Great Northern as separate competitors." *Id.*

To be sure, the Commission could not divine in the Northern Lines proceedings every situation to which Condition 24(a) might be applied. Yet the Commission there recognized "its broad and flexible power" when considering Section 5(2) applications to determine the modifications and conditions necessary to protect the public interest. 331 I.C.C. at 286. See *Penn-Central Merger and N&W. Inclusion Cases,* 389 U.S. 486, 496. If, when now presented with a Section 5(2) application, the Commission can successfully claim that its

[7] The Union Pacific shares with Peninsula and SP&S joint ownership of a minority interest in the interchange tracks connecting the SP&S main line with Peninsula, J.S. App. B–31—B–33. But there was no evidence regarding the nature of the Union Pacific interest, or that its interest in any way precluded the Northern Lines and Peninsula, the other owners, from granting the Milwaukee usage rights over the interchange trackage. Further, by acquiring joint ownership of Peninsula, the Milwaukee would succeed to the ownership interests possessed by Peninsula in the interchange tracks, which would place it on an equal basis with the Union Pacific with respect to use of the involved trackage.

power is not sufficiently "broad and flexible" to prevent the Burlington Northern from flouting the conditions by which its very existence as a merged carrier purported to be justified, the premises upon which this Court decided the *Northern Lines* case will be largely nullified. Accordingly, we submit that the Commission's refusal to implement the condition as to the Milwaukee was arbitrary and not rationally supportable by the reasons it has given.

2. More generally, the Commission inadequately analyzed the competitive factors it was required to consider in determining whether unconditioned acquisition of Peninsula by Burlington Northern and Union Pacific comports with the public interest, even without regard to Milwaukee's special rights under the *Northern Lines* condition. And it went on to base its decision on erroneous legal standards.

As relevant to Section 5(2) transactions, the test of whether a planned merger or acquistion of control is "consistent with the public interest" is whether the proposal will promote "adequate, economical, and efficient service" and "sound economic conditions in transportation." National Transportation Policy, 49 U.S.C. preceding Section 1. It is well settled that the Commission is required to weigh anticompetitive effects in determining whether Section 5(2) applications satisfy the public interest standard. See *Denver & Rio Grande Western Railroad Co.* v. *United States*, 387 U.S. 485, 492–494; *Baltimore & Ohio Railroad Co.* v. *United States*, 386 U.S. 372, 401–404 (Mr. Justice Brennan concurring). As recently restated in *Northern Lines*, "* * * the Commission must also

consider the anticompetitive effects of any merger or consolidation, because under § 5(11) of the Interstate Commerce Act any transaction approved by the Commission is relieved of the operation of the antitrust laws. *McLean Trucking Company* v. *United States*, 321 U.S. 67, 83–87 (1944)." 396 U.S. at 504. And while the Commission need not follow the identical analysis, or make the same findings, as would be required in an antitrust suit, *Seaboard Air Line Railroad Company* v. *United States*, 382 U.S. 154, 156–157, the Commission's failure adequately to consider the anticompetitive effects of an acquisition on competing lines constitutes reversible error. See *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F. 2d 953, 961 (C.A.D.C.).

In the instant case, the Commission looked no further than the competitive impact of the inclusion of the Milwaukee and Southern Pacific on the joint applicants' already substantial dominance of the Rivergate market area. It did not consider the impact the exclusive control it was assuring the applicants over both rail gateways to that market would have on the Milwaukee and the Southern Pacific, and on the shipping public's present and future interest in multi-line service there. No mention was made by the Commission of the existing marginal competitive significance of the Milwaukee recognized by this Court in *Northern Lines*, 396 U.S. at 491. Nor was attention given to the effect on the Southern Pacific's ability to serve adequately and efficiently its markets in the Southwestern States. There was little discussion of the comparative benefits to shippers of multi-line service. Thus, the

Commission did not balance the adverse competitive effects that its unconditioned grant of the application would have, and so did not fulfill the obligation imposed on it by the foregoing decisions.

Further, the Commission erred in its determination that participation in Peninsula's control by the Milwaukee and Southern Pacific, "would constitute a new operation and an invasion of the joint applicant's territory" (J.S. App. B–20). There is no authority for the proposition that railroads which connect with an independent switching carrier (Peninsula) thereby acquire the exclusive right to serve the independent carrier's industries. To the extent that such territorialization has any validity, those industries are within the Port of Portland's territory, for it is the Port which is developing the interior lines with which Peninsula will connect. Thus, the inclusion of the Milwaukee and Southern Pacific does not constitute "an invasion" of SP&S (Burlington Northern) and Union Pacific territory. On the contrary, the exclusive control of Peninsula newly granted the two giants will enable them to block the other carriers from direct access.

As authority for this concept of "territorial exclusivity," the Commission relies upon *Minneapolis, St. P. & S.S.M.R. Co. Acquisition,* 295 I.C.C. 787, 802 (J.S. App., B–21). But, if anything, that decision underscores the fallacy of the Commission's reasoning here. There, the Commission denied applications of other lines to extend their operations into territory traditionally served on a direct basis by the North Western because the North Western's economic

vulnerability made preservation of its exclusive territory important to the public interest. 295 I.C.C. at 798. In the instant case the positions of the parties are precisely reversed. The joint applicants were financially secure rail carriers, as found in the *Northern Lines* case (328 I.C.C. at 471; 331 I.C.C. at 282–283), while the Milwaukee was a weak line whose service to the Pacific Northwest required protection (331 I.C.C. at 271; 396 U.S. at 515). By a parity of reasoning, the *Minneapolis* case supports the conclusion that the acquisition of exclusive control of the Rivergate market by the two strongest rail carriers, to the detriment of a financially weak competitor, would not be in the public interest. Moreover, given the strength of Burlington Northern and the Union Pacific, the counterbalancing strength of the Southern Pacific would spur them to better service.

It is noteworthy that the Commission did not find that the Rivergate market was not sufficiently large to support the operations of the four rail carriers. It merely stated that inclusion of the Milwaukee and Southern Pacific would have an "adverse effect" on the joint applicants who already directly serve Rivergate industries. That amounts to a conclusion that Burlington Northern and Union Pacific have a legal right to exclusive occupancy of the market. Not only is this not the law, *Chesapeake & Ohio Railway Company Construction,* 267 I.C.C. 665, 679, but its application here would be particularly detrimental to the development of public industrial facilities served by one of several competing rail carriers. *Illinois Central Railroad Company et al. Construction and Track-*

age Rights, Lake Calumet Harbor, Cook County, Ill., 307 I.C.C. 493, 528, *aff'd sub nom., Illinois Central Railroad Co.* v. *Norfolk and Western Railway Co.*, 385 U.S. 57.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD F. MCLAREN,
Assistant Attorney General.
HOWARD E. SHAPIRO,
STEPHEN RUBIN,
Attorneys.

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